

**Parsippany Hotel Management Co. as Agent for the Owner, Parsippany Hilton Hotel Joint Ventures and Local 69, Hotel Employees and Restaurant Employees International Union, AFL-CIO. Case 22-CA-19190**

September 29, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS COHEN  
AND TRUESDALE

On September 27, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> as modified and to adopt the recommended Order as modified.

The Respondent operates a Hilton Hotel in Parsippany, New Jersey. Employee Joseph LaRussa, a principal organizer of the union campaign, testified on the Union's behalf at a representation hearing on March 3, 1993. LaRussa failed to report for his scheduled shift on March 3 without arranging for a substitute and received a verbal warning. Subsequently, on March 17,<sup>3</sup> LaRussa received a written warning for angrily confronting a fellow employee about the number of tables set up for a luncheon. The judge found that both of these warnings were lawful, rejecting the General Counsel's contention that the warnings were unlawfully motivated by LaRussa's union activities and participation in Board processes in violation of Section 8(a)(3) and (4). There are no exceptions to these findings. The judge, however, found that subsequent warn-

ings issued to LaRussa, on April 4, May 6, and June 15, and his termination on June 18, violated Section 8(a)(3) and (4).

Contrary to the judge, we find that the Respondent has rebutted the General Counsel's prima facie case that the April 4 warning was unlawful. As more fully set forth in the judge's decision, LaRussa reported for work 54 minutes late on April 4 because he forgot to set his clock ahead for daylight savings time. When Catering Manager Kalantary realized that LaRussa was late, he assigned another employee to set up the lunch. LaRussa was scheduled to work that day and reported the incident to Food and Beverage Director Dixon. Either Kalantary or Dixon also stated that, when LaRussa showed up, they needed to document it.<sup>4</sup> After he reported for work on April 4, LaRussa was given a written warning for tardiness.

The judge found that there was no evidence that LaRussa had acted in bad faith, crediting his testimony that he forgot about daylight savings time. The judge also found that the statement that "we needed to document it" suggests that the Respondent was seeking to target LaRussa particularly because the Respondent was not aware of the reasons for LaRussa's tardiness at the time the statement was made. Finally, the judge noted that when employee Fuller was late for the identical reason in 1994, she was not given a written or oral warning but instead was told not to worry about it. The Respondent excepts, arguing that none of these facts establish that LaRussa was disciplined because of his union activities or participation in Board proceedings.

We find merit in the Respondent's exceptions. In this regard, we adopt the judge's finding that, in the foregoing circumstances, the General Counsel has established a prima facie case that the April 4 warning was motivated by LaRussa's protected activities. We find, however, that the Respondent has rebutted that prima facie case by showing that it would have issued the warning even in the absence of LaRussa's protected activities. Thus, it is undisputed that LaRussa was tardy on April 4 in violation of the Respondent's rules. Further, as the judge briefly mentioned, it is undisputed that the Respondent has enforced its rules against tardiness against other employees. Contrary to the judge, the Respondent's failure to issue a warning to employee Fuller in 1994 does not establish disparate treatment. As the Respondent explained, Fuller had no prior disciplinary record, in contrast to LaRussa who had two recent prior warnings for infractions of the Respondent's rules at the time he received this warn-

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by issuing a written warning to, and subsequently terminating, employee LaRussa for failing to report for his June 13, 1993 shift, we rely particularly on the undisputed testimony of Banquet Manager Wester that it was the Respondent's policy to allow employees time off if they arranged a substitute, and the credited testimony of LaRussa that he had arranged a substitute and had so informed Wester prior to June 13.

In light of our findings that the warnings issued to LaRussa on May 6 and June 15, and his subsequent termination on June 18, 1993, violated Sec. 8(a)(3), we find it unnecessary to pass on the judge's finding that these actions also violated Sec. 8(a)(4) as such additional violations would not materially affect the remedy.

<sup>3</sup>All dates hereafter are in 1993.

<sup>4</sup>The judge found that Dixon made this statement; the Respondent excepts noting Dixon's transcript testimony "and I said, you know, when Joe did show up, Siros said we needed to document it." We find it unnecessary to resolve this dispute in light of our finding that the April 4 warning was not unlawful.

ing. Accordingly, the difference in discipline does not establish that the warning issued to LaRussa was unlawful.<sup>5</sup> For the foregoing reasons, we find that the Respondent did not violate the Act by issuing a warning to LaRussa on April 4 for tardiness.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Parsippany Hotel Management Co. as Agent for the Owner, Parsippany Hilton Hotel Joint Ventures, Parsippany, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

“(c) Discharging, warning, or otherwise discriminating against any employee for supporting Local 69, Hotel Employees and Restaurant Employees International Union, AFL-CIO or any other labor organization.”

2. Substitute the following for paragraph 2(b).

“(b) Remove from its files any reference to the unlawful warnings issued to employee LaRussa on May 6, 1993, and June 15, 1993, and to his unlawful discharge on June 18, 1993, and notify him in writing that this has been done and that the warnings and discharge will not be used against him in any way.”

3. Substitute the attached notice for that of the administrative law judge.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate rules prohibiting the solicitation of union authorizations cards at our facility in Parsippany, New Jersey.

<sup>5</sup>In this regard, we note that the Respondent also followed progressive disciplinary procedures with respect to the warnings issued to LaRussa, as set forth above.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 69, Hotel Employees and Restaurant Employees International Union, AFL-CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Joseph LaRussa immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Joseph LaRussa and to unlawful warnings issued to him on May 6 and June 15, 1993, and we will notify him in writing that this has been done and that the discharge and warnings will not be used against him in any way.

PARSIPPANY HOTEL MANAGEMENT CO.,  
AS AGENT FOR THE OWNER PARPIPPANY  
HILTON HOTEL JOINT VENTURES

*Gregory Alvarez, Esq.*, for the General Counsel.

*Karl M. Terrell, Esq. (Stokes & Murphy)*, for the Respondent.

*Eve I. Klein, Esq. (Richard & O'Neil)*, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 9, 10, and 11, and June 23 and 24, 1994, in Newark, New Jersey. The complaint, which issued on November 16, 1993,<sup>1</sup> was based on an unfair labor practice charge and amended charges that were filed by Local 69, Hotel Employees and Restaurant Employees International Union, AFL-CIO (the Union), on May 17, June 28, and August 26. The complaint, after being amended at the hearing (as will be discussed more fully below in the discussion of the 8(a)(1) allegations) alleges that Respondent violated Section 8(a)(1) of the Act in or about February by promulgating a rule prohibiting the solicitation of union authorization cards at Respondent's facility, impliedly threatened its employees with unspecified reprisals if they solicited union authorization cards, and interrogated its employees about their union activities and the activities of other employees. It is also alleged that Respondent violated Section 8(a)(1) of the Act, between April 15 and 22, the week preceding the Board-conducted election, by assigning security officers to engage in surveillance of employees to discover their union activities. Finally, it is alleged that Respondent violated Sec-

<sup>1</sup>Unless indicated otherwise, all dates referred to the year 1993.

tion 8(a)(1), (3), and (4) of the Act by issuing one verbal warning and three written warnings to Joseph LaRussa, and by terminating him on about June 18.

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a corporation, with an office and place of business in Parsippany, New Jersey (the facility), has been engaged in the operation of a hotel providing food and lodging. Annually, Respondent derived gross revenue in excess of \$500,000 and, during the same period, purchased and received at its facility products, goods, and materials valued in excess of \$5000 directly from suppliers located outside the State of New Jersey. Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE FACTS

Until the second day of hearing, the complaint alleged only one 8(a)(1) allegation—the surveillance by Respondent's security officers—in addition to the 8(a)(3) and (4) allegations regarding LaRussa. This complaint was based on a charge filed on May 17, alleging numerous 8(a)(1) and (3) violations directed at LaRussa, including warnings and surveillance activities directed at him. On June 28, the Union filed an identical charge, but added an allegation that he was terminated in violation of Section 8(a)(3) of the Act. On August 26, the Union filed its final charge, a second amended charge, which adds an 8(a)(4) allegation. It alleges that surveillance of LaRussa and other employees violated Section 8(a)(1) of the Act, and the warnings to, and discharge of, LaRussa violated Section 8(a)(3) and (4) of the Act. On the second day of hearing, May 10, 1994, the General Counsel moved to amend the complaint to allege that in February Respondent, by Robert Hermany, its general manager at the time, violated Section 8(a)(1) of the Act by promulgating a rule prohibiting the solicitation of union authorization cards at the facility, impliedly threatened its employees with unspecified reprisals if they solicited union authorization cards and interrogated its employees about their union activities. Over the Respondent's objection, I granted the General Counsel's motion to amend while reserving to the parties the right to brief this issue at the conclusion of the hearing, and reserving the right to reverse that ruling.

It is clear that no unfair labor practice charge was filed alleging any unfair labor practices by Hermany; in fact, the only 8(a)(1) violation alleged in the charges that were filed was the surveillance allegation, which is alleged in the complaint. It is also clear that by the time the General Counsel moved to amend the complaint to include these 8(a)(1) allegations, the 10(b) period had passed. These allegations can survive a 10(b) challenge only if they can be "revived" by the Union's earlier unfair labor practice charges, which were timely filed. Amendments such as the instant matter are usually permitted when they are "closely related" to the origi-

nal and timely allegations, or if they are based on the same factual situation or legal theory. *NLRB v. Overnite Transportation Co.*, 938 F.2d 815, 820 (7th Cir. 1991). In allowing a similar amendment, *Pincus Elevator & Electric Co.*, 308 NLRB 684, 690 (1992), stated:

While the complaint contained additional allegations regarding threats of business closure and promise of benefits, clearly, distinct acts separate in time, the legal theory underlying all of them is identical; that is, that the Respondent engaged in unlawful conduct as part of an effort to prevent the organization of its employees. . . . The fact that different sections of the Act are involved does not alter this determination. [Citations omitted.]

In *Beretta U.S.A. Corp.*, 298 NLRB 232 (1990), the Board found that 8(a)(1) complaint allegations of interrogation, threats, and the impression of surveillance were closely related to the charge allegations of multiple 8(a)(1) and (3) violations involving a union activist, noting that "all these actions were part of the Respondent's unlawful course of conduct in seeking to defeat the union organizing campaign." *Pincus* and *Beretta* are analogous to the instant situation. The timely charges and the complaint allege that the surveillance of the employees and the warnings to, and discharge of, LaRussa violate Section 8(a)(1) and (3) of the Act. The requested amendment, regarding statements made by Hermany in February, while, at least, a few weeks before the other alleged violations, if true, would constitute part of the same program to convince the employees not to join the Union. The amendment was therefore properly granted.

LaRussa had been employed at the facility as a banquet server since October 1991. By all accounts, at least, prior to about January 1993 he was an excellent employee with an unblemished work record. In about January, Respondent changed its method of compensation of its banquet employees from a commission basis to an hourly basis. This, apparently, was the genesis of the union campaign among the banquet department employees at the facility and LaRussa was a principal mover of this campaign, testifying for the Union at the Board's representation hearing on March 3, soliciting union authorization cards and leading the union meetings. At an election conducted on April 22, the Union failed to obtain a majority of the votes cast. Respondent admits that it was aware of LaRussa's union sympathies, and the General Counsel alleges that this was the cause of his warnings and discharge on about June 18. Respondent alleges that when it changed from a commission basis of compensation to an hourly compensation basis, LaRussa's attitude and work performance quickly deteriorated, and that was the cause of the warnings that he received that resulted in his termination.

As stated above, on the second day of hearing, the General Counsel amended the complaint to allege that certain activity by Robert Hermany, the facility's general manager, in or about February, violated Section 8(a)(1) of the Act. It is alleged that he promulgated a rule prohibiting the solicitation of union authorization cards at the facility, he impliedly threatened the employees with unspecified reprisals if they solicited union authorization cards, and interrogated the employees about their union activities and the union activities of the other employees. Michael Romano, who has been em-

ployed at the facility since 1988, and was employed as a banquet server during the period in question, testified that at about the end of February, Christine Wester, the banquet manager at the facility, asked him to go to a room at the facility for a meeting with Hermany. About 25 to 30 department employees were present as were Hermany, Wester, and Bianca Sorenson, the catering service manager. He testified that Hermany displayed a union authorization card and said, "Do you see this card? I don't need to see this card circulating around the hotel . . . We don't need a third party telling us how to conduct our business." He also said, "I don't want to see this anymore, and if anybody in the banquet department is distributing these cards, this better stop right now." He testified, "He wanted these cards to stop circling around the hotel. He wanted no more cards around there." Marjorie McKay, who has been employed as a banquet server at the facility since 1986, testified that in February or March she was told by the managers that there was a mandatory meeting that she had to attend. About 10 to 15 of the banquet department employees were there, along with Hermany, Wester, Christopher Dixon, the food and beverage director, and Lisa Hugo, the director of human resources. Hermany read from a letter and then waved a union authorization card and said that he did not want to see the cards on the property and that they did not need a third party to run the hotel. He also said that he thought that the union campaign began with the banquet department and was caused by the change in the method of calculating the pay. McKay told Hermany that he had previously reassured them that the method of payment would not change and he said that was a long time ago and things change. Hermany asked where the cards came from and said that he didn't want them on the property.

Melissa Brennan, who was employed as a banquet server through December, testified that she attended a meeting in February when Hermany spoke about the Union. He said, "I know there are Union cards being signed and I don't appreciate it. I feel like I'm being stabbed in the back after the way we've taken care of you. And how dare you do this to us." He then said, "If anyone comes by you to try to sign one of these cards, you should just turn and walk away." He then threw the union card on the table. Joan Roetto, who is employed by Respondent as a banquet server, testified that she generally attends meetings of department employees. She could not recollect any meeting with Hermany in which he spoke about the Union or union authorization cards. Pedro Audelo, who is employed at the facility as a banquet server, testified that he attended a meeting of employees and Hermany in about January or February. At this meeting Hermany spoke about the change in the method of compensation from gratuity to hourly; he did not mention the Union or union authorization cards.

Hugo testified that Hermany's final day at the facility was February 15, at which time he was replaced by Dennis McDowell. Respondent conducted two meetings with the banquet department employees in mid-January to explain the change in the method of compensation; one meeting was for the a.m. shift and the other was for the p.m. shift. She attended the a.m. meeting, along with Hermany, Dixon, and Wester; Dixon conducted the p.m. meeting. About 1 to 2 weeks later there was a subsequent meeting with the employees wherein Hermany answered questions that the employees

had regarding the change in compensation. Neither the Union nor union cards were mentioned at these meetings and she knows of no other meetings that Hermany had with employees during this period. She identified a letter that she testified that McDowell read verbatim to the employees at a meeting on February 17. The first paragraph states: "I apologize for reading this speech to you, however it is important that there be no question about what I have to say." He then introduced himself as the new general manager. He said that the Union wanted their money and would make a lot of promises, but the employees should ask a lot of questions. He said that even if they had signed a union card, they could still oppose the Union. He did not believe that they needed a Union at the facility. Hugo testified that McDowell never held up a union card during this meeting. Wester testified that she attended two meetings conducted by Hermany in January or February when he explained the change in the compensation method at the facility. Neither the union campaign nor union authorization cards were mentioned. Sorenson testified that Hermany conducted two meetings with the banquet department employees in January or February "to inform the staff that we were going hourly." She attended only the p.m. meeting. Hermany made no mention of the Union or union authorization cards. Siros Kalantary, who is employed at the facility as the catering sales manager, testified that he attended the first of two meetings that Hermany had with the banquet department employees regarding the change in compensation. At this meeting, Hermany made no mention of the Union or union cards.

The remaining 8(a)(1) allegation is that between April 15 and April 22, the Respondent assigned security officers to engage in surveillance of employees to discover their union activities. As stated above, the election was conducted at the facility on April 22. Respondent, admittedly, transferred four directors of security from other of its hotels to cover the facility from the period Monday, April 19, through the election day. There is a substantial credibility issue, however, of their purpose in being at the facility and, more importantly, what they did during this 4-day period.

LaRussa testified that beginning about 2 weeks before the election he noticed six unfamiliar employees at the facility; two of these individuals followed him and other employees during this period. He testified to two specific examples that he could remember during the period in question. He was working a luncheon in the Livingston Room at the facility with Ruth Hoffman, Harriet Vaccaro, and some other employees; he was doing the buffet, which was his usual assignment. The buffet is set up adjacent to, and outside the room. He initially noticed the two men at about 10:30 a.m., while he was setting up the buffet. He noticed that when he was outside of the room working on the buffet the two men sat on a nearby bench or walked back and forth in the area chatting and watching him. When he was inside the room they walked to a different area, returning when he went to the buffet. This continued until he completed the luncheon at about 2 p.m. In the other incident, he, Romano, and some other employees were sitting on the loading dock at the facility, which was a common for employees to do between working periods. He noticed the two men come out on the dock and stand near them. He and Romano went for a walk on Respondent's grounds surrounding the hotel and the two men followed them, about 50 feet behind. When LaRussa

and Romano stopped, they stopped. When LaRussa and Romano returned to the loading dock, so did the two men. On one occasion, while LaRussa, Romano, and some other employees were on the loading dock, one of these men asked him, "Why do you want a union? This is a great company to work for." LaRussa asked him who he was and why was it his business, but he did not respond. He testified that these two men wore dress slacks, a sport jacket, a shirt, and tie, but had no badge or name tag, unlike the regular security staff at the facility that wears a uniform and name tags and badges. LaRussa testified that about 2 weeks prior to the election he asked Wester who these two men were and she said that they were security men who were there to protect them. He asked her, "From what?" She said that they were there to protect them from the Union because they had been known to beat up people.

Romano testified that he began seeing these two men about 2 to 3 weeks before the election: "these two gentlemen that seemed to be there anytime I was there. They seemed to be observing us, just standing there . . . ." When he was in the cafeteria or on the loading dock they were 10 to 15 feet away from him. He testified to a situation about 2 weeks before the election when he and LaRussa were sitting on the loading dock during a break; the two men were standing about 10 to 15 feet away. They went for a walk and the two men followed them and stayed about 30 yards behind them. When LaRussa and Romano stopped walking, so did they. They walked for about 15 minutes with the two men behind them, and then returned to work. Romano testified that, unlike the security staff at the hotel, these two men did not wear badges or name tags.

Vaccaro, who has been employed by Respondent as a banquet server since 1991, testified that she first noticed these two men on April 19 in the cafeteria; however, on the following day she took more notice of them. She worked that day in the Livingston Room with LaRussa, Hoffman, and others. The buffet was in the hallway (or public corridor) adjacent to Livingston, which has double glass doors leading into the room. While Vaccaro was doing the setups on that day she again noticed the two men at about 10:30 a.m. They were standing in the hallway looking through the windows adjacent to the doors, and through the doors at them. Shortly thereafter, one of these men walked into the room and exited the room through the door that leads to the service corridor and reappeared in the hallway about 15 minutes later. From 10 until 11 a.m., when the employees went for lunch, one or both of these men remained in the area the entire time. The employees returned from lunch at 11:30 a.m. to complete preparations for the luncheon, and when she and Hoffman went to the hallway to see if LaRussa needed any assistance, she again saw the two men across the hallway from the buffet. During the luncheon, when she looked out the window of the room, she saw that they were still in the hallway across from the buffet. When they were cleaning up at the conclusion of the luncheon at about 1:30 p.m., they were still in the corridor, just across from where the buffet had been located. She testified that they were wearing sports jackets, white shirts, and a tie, but she did not see them wearing a badge or name tags. As she was leaving that day, she asked Wester or Sorenson who they were and she said that the hotel had some past problems with the Union as someone

had his leg broken, so the Respondent got extra security to protect them.

Hoffman, who has been employed at the facility as a banquet server since 1991, testified that during the week preceding the election, she worked a luncheon function in the Livingston Room with LaRussa, Vaccaro, and other employees; that day was the first time she noticed the two men. At about noon, while she was waiting for the diners to arrive, she noticed the two men standing across the hallway from where she and the others were waiting, a distance of 40 to 50 feet. Her job that day was to make sure that the food trays in the buffet were filled and she was standing in the entranceway to the room: "So I was in and out walking and looking around. Every time I looked around, I noticed those two men still standing there. I believe they were there the full time of the function." One of these men walked through the room into the service corridor; when she saw him next he was with the other man in the main corridor, across from the entrance into the room. When she looked at these men, they were looking at her and her fellow workers. The men were each wearing a suit and a tie, but had no badge or name tag. At the conclusion of the luncheon, she and Vaccaro asked Wester and Bianca who they were and they were told that they were security men who were there to protect the employees; that at another hotel the Union was involved and there were some injuries.

Robert Braga and Anthony Colletta Jr., two of the four security officers who Respondent transferred to the facility for the 4 days preceding the election, testified that they arrived at the facility on either Sunday evening, April 18, or Monday morning. Braga is the director of security at the Providence Marriot Hotel and Colletta has the same title at the Albany Marriot Hotel, both of which have common ownership with the facility. Two other security employees—Bill Downs and Skip Awlyard—arrived at about the same time. Braga and Awlyard worked the day shift during that week, while Downs and Colletta worked the night shift. They had a breakfast together (their only meeting) Monday morning with Hugo and Peter Coutis, rooms director at the facility. Braga testified that at this meeting they were told to just keep walking around the facility, make sure that the guests had peace and quiet, and that there was no solicitation and no signs or fliers placed on cars. They were also told of some specific individuals who were involved in the union campaign, including LaRussa, who was pointed out to them. They were not told to watch particular employees, nor were they told to find out what the union people were doing or saying. They were given name tags to wear with their first name on it and they wore them that week; when Colletta and Downs relieved them, he saw that they were wearing their name tags. During that week, they spent most of their time walking around the parking lot. Between these rounds walking the parking lot, they sat in the lobby for short periods of time. He estimates that they spent about an hour and a half of each day in the lobby. They never followed anybody in the parking lot or at the facility and never watched anybody inside the hotel. He does not remember seeing LaRussa outside the hotel at any time, and never spoke to him. At the end of the week nothing out of the ordinary had occurred so they did not have to report to anybody at the facility prior to leaving.

Colletta testified that he, Braga, Awlyard, and Downs met with Hugo and Coutis on Monday morning, April 19. They

were told that a union campaign was in progress and that their "limited direction" was to enforce the no solicitation rule and to see that the hotel operation and the guests were not disrupted over the following days. They were not told to watch any particular employees, nor were they told to see who was active for the Union. He does not remember being told about LaRussa at this meeting. They were also not told to see whom LaRussa was talking to, nor were they told to follow anybody. At this meeting they were given name tags, which they wore. During his shifts, he made rounds in three areas of the facility, the guest floors, the public areas, which includes the parking lot, and the employee only areas. At the end of his stay at the facility he did not make a written report, because there was nothing to report.

Hugo testified that for the 4 days prior to the election the Respondent assigned four security officers from other properties to the facility to ensure that only authorized individuals were on the property and "in anticipation of some outside activity that could be detrimental to our guests." Their assignment was to patrol the parking lot and the entire property. All employees at the facility wear name tags and, to the best of her recollection, the officers on this task force wore name tags, but she could not specifically recollect seeing them wearing these tags. She testified that in late 1992, the regular security staff at the facility had been reduced from eight to three and Respondent felt that this might not be adequate for the week preceding the election, and that is why they employed the task force from the other properties.

As stated above, LaRussa testified for the Union at the Board's representation hearing on March 3. He testified that he worked the lunch and dinner shifts on the prior day. At about 8 that evening he called his home and was told that he had received a subpoena to testify the following morning at the Board's office. He testified that although he knew that he would be receiving a subpoena to testify, until he spoke to his son that evening he did not know that he would be testifying on March 3. Shortly thereafter, Kalantary approached him and asked if he was going to work the following day. LaRussa responded that he didn't think that he would be. Kalantary responded that he heard that he wasn't coming in, and LaRussa said that he had received a subpoena to be in court the following morning and said that he would definitely not be there for the lunch shift and asked Kalantary to get someone to cover that shift. Kalantary said that he would take care of it and asked whether he would be in for the evening shift. LaRussa said that he wasn't sure because he didn't know how long it would take the following day, "I told him that I wanted to work, but to play it safe, get somebody to cover for me." Kalantary said that it wouldn't be a problem because he had plenty of people available. He testified that he arrived at the Board hearing at about 9 a.m. on March 3 and began testifying at about 1:30 or 2 p.m., testified for an hour or two, but was asked to remain at the hearing by the Union's attorney and was not "excused" until 5:30 or 6 p.m. Hugo, and other of Respondent's representatives, were present at the hearing, but he was not certain whether other employees were there. He left the Board office and "went straight to work," arriving at the fa-

cility at about 7 p.m.<sup>2</sup> He went to see Kalantary to tell him that he had to return for the second day of hearing on the following day and therefore would not be available for work on his next scheduled shift. Kalantary said that he would take care of it. LaRussa asked him if he had covered his shift that evening, and Kalantary said that it was not a problem, that he had enough people to cover the shift. He heard nothing further about the matter until March 8. On that day, Wester told him that Dixon wanted to see him in his office, where the three of them met. Dixon asked him why he did not call or show up for work on March 3; LaRussa told him that he had received a subpoena the prior evening to report to the Board hearing. Dixon asked why he did not work the evening shift, and he said that he didn't leave the Board office until 6 p.m., and Kalantary said that he would cover the shift for him.

Dixon wrote a memo dated March 8 stating:

Joe was on the schedule to work on March the 3rd. On March 2nd Siros Kalantary was told by another associate that Joe was not coming into work the next day. Joe was asked by Siros on that night if he was indeed coming to work. He said no, he was not. Joe did not show up to his scheduled shift on March the 3rd.

Joe received a verbal warning for improper call off procedure. Joe refused to sign the verbal warning.

The verbal warning given to LaRussa, dated March 8 (his first warning) states:

Joe LaRussa was scheduled to work March 3, 4 p.m. Joe did not show up for his scheduled [sic] or call in. According to company policy you must call in 2 hrs. prior to scheduled shift and when possible talk to your immediate manager. Joe is aware of our policy when calling out and must follow or further disciplinary action will be taken.

Beneath this statement, is stated: "This was verbally addressed with Joe by Christine Wester and Chris Dixon. Joe said that on the night of March 2nd, Siros Kalantary did ask him if he would be in on March 3rd and he said no."

Kalantary testified that on the evening of March 2 he was told by "a second party" that LaRussa would be at the hearing on the following day. He checked the schedule and saw that he was scheduled to work the following day on the lunch shift to arrive at 10 a.m. and the dinner shift to arrive at 4 p.m. He approached LaRussa at about 6 or 7 p.m. and said that he understood that he was going to be at the hearing the following day. LaRussa asked, "Who told you?" and Kalantary said, "Were you going to surprise us?" Kalantary said that he would find a replacement for him for his first shift, but asked if he would be there for the second shift and LaRussa said, "yes, definitely" he would be there for the 4 p.m. shift. Kalantary got a replacement for LaRussa's early shift, but did not arrange for a replacement for the afternoon shift. LaRussa did not appear for work that afternoon or evening, nor did he call to say that he would not be there. On the following morning, Kalantary asked LaRussa why he

<sup>2</sup> LaRussa testified that it can take about 1-1/2 to 2 hours to drive from Newark to Parsippany. I take official notice of the fact that the distance from Newark to Parsippany is about 15 to 20 miles.

didn't appear or call the prior day. He said that since Hugo was at the hearing and saw him there, he didn't think that it was necessary to call to say that he wouldn't be in. Dixon testified that he saw LaRussa at the facility dressed in street clothes at about 5 p.m. on March 3; Kalantary could not recollect whether he saw LaRussa at the facility that evening.

Hugo testified that she was told that on March 3, LaRussa did not report for work nor call in, but was seen at the facility:

The rule violation was no call no show for his scheduled shift. The background information was the fact that Joe knew he would be at the hearing. He made no attempt to tell his supervisor. His supervisor had to approach him in order to verify hearsay that he had heard from other employees that Joe would not be there. Joe said that he would be there for his afternoon shift and made no attempt to call during the day to say that he wouldn't be there. Or to say that he'd be late. To say that he was still in the hearing, or anything. He later reported to the property in his street clothes and yet still did not report for his shift. And the other associates who were at the hearing, did report for their afternoon shift.

She testified that Luis Ballanos and Gilberto Gomez were at the hearing with the union representatives. Ballanos was scheduled to work that day and had previously notified his supervisor that he would not be there for the lunch shift, but did report for the dinner shift.

Wester testified that on the afternoon of March 3, when she didn't see LaRussa, she asked Kalantary if LaRussa was coming in for the dinner shift and he said that LaRussa didn't say anything to him about it and, as far as he knew, LaRussa would be in. Ballanos, who was at the hearing, reported for his 4 p.m. shift. She told Dixon about this situation.

An incident occurred on March 17 that resulted in LaRussa's second warning, and first written warning. It involved a 2-day luncheon held at the facility. The organization running the luncheon had told Respondent that there would be approximately 45 people present. On the first day, March 16, about 10 or 15 additional people appeared for the luncheon, resulting in some scrambling for additional tables and table settings for the unscheduled guests. On the following day, LaRussa was in charge of setting up the buffet table; also working that room was Roetto, Jackie Fuller, Nella Chiaravalloti, and others. LaRussa testified that he was expecting the same group, about 60 people, for lunch that day. Sorenson came into the room and told one of the facilities employees to remove a table that was in the room. LaRussa asked him what he was doing, and he said that he was removing the tables as Sorenson had told him to do. LaRussa approached Sorenson and said, "Why are you having them remove the tables? We need them." Sorenson said that they didn't need the extra tables and LaRussa said that they did, "I worked this party yesterday, we're going to have the same problem today. We were short yesterday. They're only going to tell you that there's 45 to 47 of them show, but 60 will show." Sorenson said, "Don't give me your bullshit. I don't need that today. Take the tables out." LaRussa answered, "Don't talk to me that way. This is

bullshit to do all this double work." This occurred while they were setting up for the luncheon, prior to the guests arriving. He testified that, just as the prior day, about 60 people appeared and, at the last minute, they had to put place settings on cocktail tables in the room to accommodate the additional guests. At the conclusion of the luncheon, Wester asked him to come with her to Dixon's office. Dixon asked him what occurred that day with Sorenson and he told him of the events as recited above. Dixon said that he had heard a different story; that he heard that he had yelled and cursed at Sorenson and that he had to believe her. LaRussa testified that employees and supervisors use profanity "every now and then." Sorenson used profanity "quite a bit. She has a bit of a temper." McKay testified that it was not unusual for employees and supervisors to use profanities.

LaRussa was given a written warning that same day. It states that the customer requested that a table be removed from the room and that LaRussa "became irate and yelled, 'no way I'm going to do that after what happened yesterday. This is bullshit.'" The warning states that this incident was witnessed by Roetto and Chiaravalloti and concludes, "This behavior towards a fellow associate is not acceptable and may be considered gross misconduct. Any further incidents will result in termination."

Fuller testified that on that morning she left the room just as LaRussa and Sorenson were "discussing a table." When she returned about 15 minutes later, "there was tension in the room," and she heard Sorenson say, "I don't have to put up with this bullshit any more." Roetto testified that when she arrived for work that day she met Sorenson, who told her that she would be working the lunch in the room involved. Sorenson directed a houseman to remove a table (unset) from the room. While the houseman was removing the table, Sorenson was stacking the chairs. LaRussa asked Sorenson what she was doing, that the prior day they had to add places for the luncheon, and Sorenson said that the woman called and wanted the table removed. LaRussa became angry and shouted at Sorenson; Roetto remembers that he used the words "bullshit" and "God damn." During this time, Sorenson told him, "Joe, take it easy, I just spoke to the woman."

Chiaravalloti, who was employed by Respondent from January to April as a banquet server, testified that while the employees were setting up for the luncheon, she heard LaRussa having an argument with Sorenson. Although she does not know what preceded it, she heard LaRussa scream at Sorenson, "Bullshit. I'm not going to do it. This is bullshit, fuck this." Sorenson was standing next to LaRussa at the time, but was backing up as he was screaming and then walked out of the room. After the set up was completed for the luncheon, she was called into Wester's office and questioned about the incident. She responded as she testified above.

Sorenson testified that on March 16, the client had estimated that 45 people would show up for the luncheon and about 55 appeared. The tables were already in the room, but the staff had to put the table settings on the tables for the additional people. On the following day the client called and said that there would not be the extra people on that day. When she walked into the room she noticed that an additional table was being rolled into the room and set up. She asked the houseman to remove the table and LaRussa started

yelling, "what do you mean, remove the table?" Sorenson started to tell him that the woman who ordered the luncheon wanted the room set for fewer people and said that if extra people showed up, they could be seated at the cocktail tables already in the room. LaRussa began yelling that it wasn't right, that the woman was off with her count on the prior day. He began yelling very loud and Sorenson left the room because she was so upset and nervous because of what LaRussa had done. She asked to be, and was, relieved of the luncheon because she was so upset. They were expecting 40 people that day; 38 showed up for the luncheon.

Wester testified that when she saw Sorenson that morning at about 10:30 a.m. she was "visibly upset . . . on the verge of tears." She told Wester of the problems on the prior day with extra people, her conversation that morning with the customer, and how LaRussa had reacted to the removal of the table. Wester told her that she would cover the luncheon. Wester then spoke to Chiaravalloti and Roetto about the incident. She met with Dixon and told him that she could not allow an employee to speak to a manager in that manner and they decided that a written warning was warranted.

LaRussa's third warning (the second written warning) occurred on April 4, when LaRussa arrived at the facility 54 minutes late. On the prior evening, clocks were turned ahead 1 hour for daylight savings time; LaRussa testified that he forgot about the time change and that was the cause of his being late. LaRussa was scheduled to report for work at 8:30 a.m. on that day for a 10:30 brunch for 10 adults and 4 children. He punched in at 9:24 that morning unaware that anything was wrong. He testified that when he was told that he was late, he realized that he had forgotten to turn his clock and watch ahead the night before, but he was able to set up his function and was completely set up at the time the guests appeared. At the conclusion of the function, apparently about noon, he was told that Dixon wanted to speak to him. He went to his office and Dixon asked him, "Do you realize that you were late?" and he said that he did, although he was not aware of it until after he got to work. He also told Dixon that the party was set up before the guests arrived and they were not inconvenienced. Dixon responded, "Yes, but you were still late and you did not call." LaRussa responded that he did not call because he didn't realize that he was late until after he arrived for work. Dixon then handed him the written warning that he refused to sign. The warning states that he was scheduled to report for work at 8:30 a.m. and did not report until 9:24 a.m. It concludes: "Repeated tardiness is a sign of unreliability and any future tardiness will result in disciplinary action."<sup>3</sup> Fuller testified that she was an hour late for work on Easter Sunday, April 3, 1994. She was scheduled to arrive at 7:30 a.m. and arrived at 8:30 a.m. When she arrived at the facility and saw the other employees in the room where she was scheduled to work, she realized for the first time that she was late because she forgot to turn her clock and watch ahead the prior evening for daylight sav-

ings time. She told Sorenson that she was concerned about getting in trouble for being late, and Sorenson said, "Don't worry about it." That was the first time that she was late while employed at the facility.

Kalantary testified that when he realized that LaRussa was late, he had another employee set up his room for him. As discussed earlier regarding the surveillance allegation, the facility gives the employees 2 hours to prepare for the functions. They spend the first hour setting up the room, take a half hour meal break, and then bring in the food in the half hour preceding the function. Kalantary testified that when LaRussa arrived, he told him that he was late and LaRussa said that he had called the facility (Kalantary could not remember whether he said he called security or the hotel operator) to say that he would be late. Kalantary checked and found no message from LaRussa that he would be late. Dixon testified that on that day, Kalantary told him that LaRussa had not appeared yet for work. He told Kalantary that when LaRussa appeared, "we needed to document it." Kalantary had to "scramble" to get another employee to set up the room. When LaRussa arrived, Dixon asked him why he was late, and he said that he forgot to set his clock ahead for daylight savings time. When Dixon asked him why he didn't call, LaRussa said, "What's the difference? I got my work done." Dixon further testified that they "normally" post a notice to remind employees to change their clocks when time changes are approaching, but he could not remember whether such a notice was posted in the days preceding April 4.

The fourth warning that LaRussa received, the third written warning, was for clocking in early. This relates to the change in the method of compensation, as described above. Prior to about January, the employees were paid on a gratuity commission basis. Subsequent to that time, they were paid on an hourly basis that required that they punch a time-clock when arriving at, and leaving from, work. The warning, dated May 6, states:

On Tuesday, 5/4/93 Joseph was told by the banquet manager that he could not punch in earlier than his scheduled time. On Wednesday, 5/5/93 Joseph was scheduled at 10 a.m. and punched in at 9:29 a.m. On Thursday 5/6/93 Joseph was scheduled at 10 a.m. and punched in at 9:33. There was no other reason for him to be at work early. Servers do not have the discretion to come in early on their own accord. Joe was specifically told not to punch in early and he did.

LaRussa testified that he was scheduled to work beginning at 10 a.m. on May 6. As was his usual procedure, he arrived about a half hour early (in order to give himself some leeway in case he was delayed by traffic), clocked in, picked up his event order, and made himself a cup of tea prior to setting up for his luncheon. He testified that most of the employees in the department also clocked in about a half hour prior to their starting time. Later that day, Dixon asked him why he clocked in early and he said that to avoid the possibility of being late, he had a habit of coming in early, and clocking in when he arrived. Dixon told him that he was told at a meeting of employees not to clock in early, and LaRussa said that he was not at any such meeting. Dixon said that there was a meeting of employees a few days earlier, and

<sup>3</sup> There was a substantial amount of testimony, as well as voluminous exhibits, involving tardiness problems of other employees. Because of the unique nature of this incident, the fact that there is no evidence that LaRussa had previously been late, and that due to the nature of this incident he would not have called the facility before arriving because he was not aware that he was late until that time, I find that this evidence is not relevant and therefor will not be considered.

LaRussa said that he had a doctor's appointment that day and did not attend the meeting. Dixon said, "Well, you should have found out." LaRussa testified that prior to this conversation with Dixon, he was not told by any management representative that he was not to clock in early, nor was he aware of such a rule.

Romano, who has been employed at the facility as a coffee server since 1988, testified that on Wednesday, May 5, at about 1:30 p.m., he saw a notice posted at the facility announcing a banquet staff meeting at about 3 p.m. that day.<sup>4</sup> He immediately went to see Wester and told her that he was sorry, but he could not attend the meeting because he was going to see his mother in the hospital. She said that it was not a problem, that she would fill him in on the meeting the following day. On the following day he was scheduled for a morning shift beginning at 6 a.m. and an afternoon shift beginning at 3:30 p.m. In these types of situations, the procedure is to clock out at the conclusion of the early shift and clock in for the later shift. Respondent's time records establish that he clocked in at 4:59 a.m. for the morning shift, and at 2:57 p.m. for the later shift. After clocking in for the afternoon shift, he got a glass of water and sat at the loading dock until he had to begin work, which was his usual routine up to that time. He was told that Wester wanted to speak to him. He went to her office and she said, "Don't take this personally and don't get upset, but you are clocking in too early and it has to stop. Don't clock in early any more." He said fine, that it wouldn't happen again, and it didn't. That was the first time that he was told not to clock in early. Wester testified that she had asked Romano to clock in early that day.

Fuller testified that prior to May she clocked in a half hour before she was scheduled to work. In May she attended a meeting where she was told that the employees would be disciplined for clocking in early and she and the other banquet employees followed this rule. Brennan, who was employed as a banquet server at the facility from 1991 through December, testified that she attended a meeting of the banquet staff on about May 5 where Wester told the employees not to clock in more than 10 minutes prior to their starting time. After that meeting she stopped clocking in early. Roetto testified that she attended a meeting in early May when Wester told the employees not to clock in more than 7 minutes before they were supposed to begin work, and she followed this direction. Audelo testified that he attended a meeting presided over by Wester in early May where she told the employees that the computer records showed that employees were clocking in prior to their starting times and that she wanted the employees to clock in between 6 and 7 minutes prior to starting time and no more than that or they would be disciplined. Prior to this meeting some banquet servers clocked in earlier. After this meeting he clocked in as Wester had directed them. In a note written by Audelo on July 10 at the request of Respondent, he states that the meeting took place on May 5.

Wester testified that beginning on May 1 the timeclock became important because the employees were being paid an

hourly rate for each hour they worked. During the prior 3 months, labor costs were very high and it was brought to her attention that employees were clocking in early and clocking out late. On May 4 she conducted a meeting with the banquet department employees; the main subject was "milking the clock." She told them that they were to clock in at their scheduled time unless otherwise instructed and that clocking in early would result in discipline. LaRussa was not present at the meeting, but she saw him that afternoon at about 4. She testified that LaRussa was one of the employees coming in for the dinner shift, but the banquet department schedule for the week states that he worked from 10 a.m. to 1:30 p.m. in addition to the 4 to 11 p.m. shift on May 4. She met with LaRussa and told him that she wanted him to know about her meeting with the employees. That they were not to punch in before their starting times until told to do so and that she was going to start documenting employees for violating this rule.<sup>5</sup> She turned around and saw that Kalantary and employee Bill Andreoreo were a few feet away from her while she was talking to LaRussa. She did not work on May 5. She worked on May 6 and saw LaRussa clocking in at 9:30 p.m.; she looked at the schedule and saw that he was supposed to begin work at 10 p.m. She told Dixon that she told LaRussa 2 days earlier that he had to be careful and only clock in at his scheduled time. She said that she was going to document LaRussa for clocking in early on May 5 and 6 and the above-mentioned warning was given to him.

Respondent maintains a punch detail report that states the times that the employees clocked in and out. Wester testified that, at the time, the managers reviewed and edited these reports to correct mistakes and discrepancies. In fact, LaRussa's record had to be corrected because he forgot to clock out on May 5. Theoretically, a comparison of the punch detail report with Respondent's weekly schedule for the banquet department employees for the week beginning May 1, would assist in determining when Wester met with the employees to inform them of the new rule about not clocking in prior to their starting time, and whether any other employees violated this rule late in that week. Unfortunately, an examination of these records does not appear to be very helpful. One problem is that the employees sometimes made mistakes in clocking in or out, as LaRussa did on May 5. In addition, the weekly schedule is not "written in stone." Although there are some changes written on the schedule, the punch detail report for certain of the employees convinces me that there were other changes not noted on the schedule. These records establish that Audelo clocked in 10 to 20 minutes prior to his start time throughout the entire week of May 1, without change. Bolanos clocked in almost exactly at his starting time throughout that week, except for May 7, when he was 8 minutes early. Brennan clocked in 9 p.m. and 18 minutes early on May 3 and 4; right on time May 5; 11 and 18 minutes early for the two shifts on May 6; and 12 and 11 minutes early for the two shifts on May 7. Fuller clocked in 23 minutes early on May 4; 31 minutes early on May 5; apparently, 12 minutes late on May 6; and 12 minutes early

<sup>4</sup>He testified that he remembers that this occurred on May 5 because on that day he worked only the early shift so that he could visit his mother in the hospital. On the prior 2 days he worked both the early and late shifts, and Respondent's records confirm this.

<sup>5</sup>Wester's affidavit given to the Board in July states that she had the meeting with the banquet department employees "in or about early May 1993, I'm unsure of the specific date," and that she spoke to LaRussa about this subject "a couple of days after the May meeting."

on May 7. Gomez clocked in early by 39, 8, and 11 minutes on May 1, 2, and 3; right on time on May 4; was 4 minutes early May 5; 17 and 6 minutes early for his two shifts on May 6; and was 8 minutes early on May 7. Roetto clocked in 22 minutes early on May 1; 19 minutes early on May 4; 24 minutes early on May 5; and 4 and 7 minutes early on May 6 and 7. Romano clocked in 25, 17, and 34 minutes early on May 3, 4, and 5; and 1 to 3 minutes early on May 5 and 6.

Kalantary testified that at every monthly department meeting since January, Wester told the employees not to clock in prior to their starting time. In addition, on May 4, he overheard Wester tell LaRussa that she saw him clock in at 3:30 p.m. when he was not supposed to work until 4 p.m., and that he was not supposed to do that. He wrote a memo to the file dated May 6 identifying May 4 as the date he overheard this conversation. Kalantary then obtained the punch detail report and saw that LaRussa had clocked in at 3:30 p.m. instead of 4 p.m. and told him of Respondent's clock in policy and warned him not to punch in early again.

Respondent's house rules provide for termination for employees who receive three written warnings within a 12-month period. As of May 6, LaRussa had received three written warnings within less than a 2-month period, but was not fired. Hugo testified:

With Joe, we were taking an extra measure of precaution. His behavior was so blatant. And, truthfully, so unlike Joe prior to the Union campaign, that it really seemed as though he was taunting us, or tempting us to fire him.

And I'm not sure he really understood that he could have been fired. So, in order to give him one more opportunity, to let him know for sure that he was getting very close to termination and was subject to termination, we decided to give him one more chance.

In this regard, Wester testified that LaRussa "was a good employee . . . I was hoping he would turn around. . . . I was hoping . . . we could give him another chance, and the situation would be corrected."

LaRussa's final warning, dated June 15, was for failing to report for work as scheduled on June 13; it resulted in his discharge. There are conflicting versions of this incident. It is undisputed that the weekly schedule for the workweek Saturday through Friday is usually posted on Thursday, and that on the schedule posted at the facility on Thursday, June 9, LaRussa was scheduled to work Sunday, June 13. It is also undisputed that Brennan invited LaRussa to a brunch birthday party she was having at the facility on June 13 and that LaRussa requested the day off. What is disputed is whether LaRussa obtained a substitute to replace him on that day and whether that substitute contacted Wester.

LaRussa testified that the procedure they employed in his department at the facility to request a day off was to notify Wester (who prepared the schedule) by Wednesday of the prior week what day you wanted off. She usually prepared the schedule Wednesday evening and if you had your request in by that time you always got the day off. Obviously, since Brennan was giving the brunch at the facility on June 13, she had obtained that day off, and the schedule confirms that. Once the schedule was posted, you could still get a day off

if Wester had enough available employees to cover the shift. If not, it was the employee's responsibility to find a substitute. If he/she located a substitute, he/she got the day off. He is not aware of any situation prior to June wherein an employee got a substitute, but was not allowed the day off. He testified that late in the afternoon on Tuesday, June 8, he started to tell Wester that he needed 2 days off (June 13 and 18) and she said that she was going to a meeting: "Don't bother me with that right now, I'm very busy. I make up the schedule on Wednesday. Let me know then." On the following day, he called Wester's office. Kalantary answered the phone and LaRussa asked to speak to Wester; he said that she was not there, that she was at a meeting. LaRussa told him to remind Wester, before she makes up the schedule, that he needed June 13 and 18 off. Kalantary said that he would leave a note for Wester about LaRussa's call. LaRussa said that if Wester had a problem, to ask her to call him. He did not work that day, but when he reported to work the following day, Thursday, Wester told him that she had gotten his note, but she could not give him the time off that he had requested. When he asked why, she said that she just couldn't do it, and that she had given him Mothers' Day off. He responded that he had asked for that day off months in advance and didn't get paid for it. She said that she couldn't give him the days off and he said that he would get somebody to work for him. He said that he would ask McKay to cover his shift for him on Sunday. Wester said that McKay does not work on Sundays and LaRussa said that maybe she would work for him as a favor. Wester said, "Well, she doesn't work on Sundays for me, so I don't know why she would work for you."

After LaRussa's luncheon shift that day, he called McKay. He asked her if she would work his luncheon shift on Sunday, June 13 and she said, "No problem." She asked what it was and he said a brunch and she said that it was not a problem. He said that he would call her to tell her if it was cleared and she said that was fine, just that he should let her know. Later that afternoon, LaRussa went to see Wester and told her that he got somebody to cover for him on Sunday. She asked who, and he said McKay. She said that she did not want her: "She won't work for me, she's not working for you." LaRussa said, "Well Christine, I covered my shift. I still need the time off and I still have to take it." She said that it wasn't her problem. Sometime later that day, LaRussa circled his 9 a.m. scheduled starting time on the work schedule for June 13 and wrote next to it: "Not working. You were told on Wed." The following day LaRussa called McKay; she was not in so he left a message on her answering machine not to come in on Sunday: "Forget Sunday. Christine won't let you work." He did not work on Sunday, June 13; his next scheduled workday was Tuesday, June 15. When he arrived that day, Wester told him that Dixon wanted to see him in his office. He said that he would not go to see Dixon until he was told what it was about. Dixon then joined him and LaRussa again said that he would not speak to them because they had been harassing him. He said that he would go to human resources instead. They went to the human resources office where he was given his fourth written warning and suspended because he failed to report for work as scheduled on June 13. He said that he had notified Wester in advance that he needed the day off. They said, "Did you come to work?" He said that he didn't. He was

told that he was being suspended for 3 days and would be notified of the final determination. About a week later he was told that he was terminated.

Vaccaro, who has been employed at the facility as a banquet server since 1991, testified that the work schedule was usually posted on Thursday for the following Saturday through Friday. The policy during 1993 was if you wanted a particular day off during that period, you put in a written request to Wester, Sorenson, or Kalantary for the time off by Wednesday. When you followed that procedure, you received the day off unless Wester had previously notified the banquet staff that it was to be so busy that everyone would have to work. She testified further that sometime during the spring of 1993, either Wester or Sorenson said that any employee who made a request for a day off after the Wednesday "deadline" for these requests, had to obtain a substitute. Hoffman, who has been employed at the facility as a banquet server since 1991, testified that the policy at the facility was that if you wanted a day off, you made that request by Wednesday, because the work schedule comes out on Thursday. In about February, at a meeting of employees, Sorenson said that if they needed time off after the schedule was posted, the employee had to obtain a substitute for the particular shift. Fuller testified that she has obtained banquet servers to substitute for her on shifts that she wanted to be released from. On these occasions she informed the manager on duty of the change and it has always been approved. She knows of no situation when a banquet server was denied the right to have a substitute replace him/her on a shift. Brennan, who was employed as a banquet server at the facility from September 1991 through December, testified that the procedure the employees followed for requesting time was to make their request before the schedule was posted. If the request was made by that time it was always granted. Once the schedule was posted you could still request time off if you found somebody to cover for you. She was not aware of any situation at the facility prior to June, when a banquet server secured a substitute, but was denied the time off. Wester usually notified the employees that upcoming weekends were going to be busy by telling the employees or posting a notice saying that it was going to be a busy time, so don't ask for time off. She was never informed that the weekend of her party was a busy time. Brennan testified further that about 5 p.m. on June 9 she reminded Wester that she needed to be off on June 13 for the brunch party at the facility for her daughter. Wester told her to write it on a note and put it on the bulletin board in her office. She went into Wester's office to write the note and was going to add LaRussa's name to her note, but she saw a note on the bulletin board requesting the day off for LaRussa, "so I didn't add his name to my name." Roetto, who has been employed at the facility as a banquet server for over 10 years, is Brennan's aunt. Brennan invited her to the party and she asked Wester if she could take the day off to attend the party, but did not testify when she made the request. Wester told her that she was very busy that day and would rather she didn't go. She worked that day, but Wester assigned her to a room near the party so that she was able to go in during a slow time.

McKay, who has been employed at a banquet server at the facility since 1986, testified that the procedure at the facility for requesting time off was to notify Wester by Wednesday of your need for the time. If you made the request after

Wednesday, you had to find a replacement to cover your shift. She knew of no situation when an employee who got a request in by Wednesday, or after Wednesday but with a replacement, was denied the time off. She testified that she prefers not to work on Sundays, but that she has worked "plenty of Sundays" when the facility was busy and Wester called her to work. On the evening of Thursday, June 10, she received a telephone call from LaRussa, who told her that Brennan had invited him to a party that she was giving at the facility. He asked if she would do him a favor and cover his brunch on Sunday. She said, "Sure, no problem." He said he would call her back to tell her the reporting time for the affair. On either Friday or Saturday, when she got home, there was a message from LaRussa on her answering machine. It was that she should not bother coming to the facility because Wester would not let him use her as a replacement. On either Friday or Saturday she spoke to Fuller, her sister, who told her that she didn't think that McKay would be working on Sunday, because Wester told her that if McKay was not available for her, then she was not available for LaRussa. As a result of LaRussa's call, and her conversation with Fuller, she did not go to the facility on June 13. Fuller testified that on the afternoon of June 10, LaRussa told her that he was looking for a replacement for Sunday, and she recommended that he call McKay and he said that he would. Later that day she spoke to him again and he said that McKay said that she would cover his shift on Sunday. On about Friday, LaRussa met Fuller and told her that Wester wouldn't allow McKay to cover for him on Sunday. That evening, Fuller asked Wester if McKay was going to cover for LaRussa on Sunday and she said that she wasn't. When Fuller asked why, Wester said that since McKay normally didn't work for her on Sunday, she did not want her working for LaRussa. She later called McKay and told her of this conversation. She testified that Wester never asked her if McKay would cover for LaRussa on Sunday.

Wester testified that the schedule has to be posted by Thursday, and takes a few hours to prepare. Requests for days off have to be made to her by Tuesday, otherwise they are denied unless it is slow and the employee can obtain a replacement to cover the shift. She testified that LaRussa never requested Sunday off, either verbally or in writing. She saw him on Wednesday, after 6 p.m., but he didn't say anything to her. She took the schedule home with her and completed it at that time and posted it on Thursday, shortly before noon. When she arrived at the facility the next morning at 6 a.m. there was a note on her desk, "it was scribbled Joe needs Sunday off." She doesn't know who wrote it. "I didn't really . . . pay a lot of attention to it. I figured if he needs the day off he was going to request it sooner than the day the schedule goes up. I didn't think it was going to be a big deal." She saw LaRussa shortly after posting the schedule and said that she was sorry, but she could not give him the day off; they were very busy with a couple of bar mitzvahs, followed by a wedding. She also told him that she had given the day off to Brennan and "Giselle," both of whom had requested it a week earlier, although Wester's affidavit to the Board states that Giselle requested the day off on June 8. In addition, Roetto had asked for the day off to attend Brennan's party, but she had to work because Wester needed her. LaRussa became irate and screamed at her that she was being unreasonable. She said that he was one of

only two people whom she gave off on Mothers' Day the prior month. Neither at that time, nor anytime, did LaRussa offer to get a substitute to cover for him on Sunday. On that same day, Thursday, at about 1:30 p.m., Fuller said, "What if I get my sister Marge to work?" Wester said that she doesn't work on Sundays for religious reasons. "I've asked her several times. I don't think she's going to work." Fuller said that she might be willing to work and Wester said, "Fine. If you can get Marjorie to work, great. Go ahead." Wester had still not heard from McKay by Saturday, so she asked Fuller what was going on with McKay. Fuller said that she was sometimes difficult to reach. On Friday night Wester and Sorenson were discussing the weekend schedule and she asked Sorenson if McKay was going to cover for LaRussa and she said that she didn't know. Wester told Sorenson to call McKay and Sorenson dialed her number and, when there was no answer left a message on her answering machine to call them and tell them if she would be at the facility on Sunday to cover LaRussa's shift. She never received a reply from McKay, and never took LaRussa off the schedule and he did not appear for work that day, although he was at the facility attending Brennan's party.

Sorenson testified that she called McKay on Friday night. She got the answering machine and left a message to call the facility to tell them if she could cover a shift on Sunday. She called McKay because "she was the next person that wasn't working." She does not recall anybody suggesting that she call McKay.

#### IV. ANALYSIS

It is initially alleged that Respondent, by Hermany, in about February, violated Section 8(a)(1) of the Act by promulgating a rule prohibiting the solicitation of union authorization cards at the facility, impliedly threatened its employees with unspecified reprisals if they solicited union authorization cards, and interrogated its employees about their union activities as well as the union activities of other employees. The evidence in support of these allegations was supplied by Romano, McKay, and Brennan, each of whom was a very direct and credible witness with nothing to gain from this proceeding. Additionally, Romano and McKay were still employed at the facility at the time of the hearing; Brennan left its employ in December. The testimony relates, principally, to what Hermany said about authorization cards. Hermany, whose employment with Respondent ended in February, did not testify. Roetto and Audelo, also credible witnesses, testified that they attended no meetings at the facility in which Hermany spoke about the Union or union authorization cards. Hugo, Wester, Sorenson, and Kalantary testified that Hermany spoke to the banquet department employees in January or February about the change in the method of compensation of the department employees, but did not speak about the Union or union authorization cards. Hugo testified that on February 17, McDowell conducted a meeting with the banquet department employees when he read from a letter stating that he didn't believe that they needed a union. This is a difficult credibility determination. Romano, McKay, and Brennan were each credible and believable witnesses who testified to statements that Hermany made about the Union. Roetto and Audelo, also credible witnesses, testified that they never attended any meeting when Hermany made such statements. Hugo, Wester, Sorenson, and Kalantary, cer-

tainly not obviously incredible witnesses, testified that they knew of no such meeting when Hermany spoke about the Union, and Hugo testified that it was McDowell who spoke to the banquet department employees about the Union. Because I found their testimony the most believable regarding this allegation, I credit the testimony of Romano, McKay, and Brennan.

In *Montgomery Ward*, 269 NLRB 598, 599 (1984), the Board stated:

It is well established that discriminatory enforcement of a facially valid no-solicitation, no-distribution rule violates Section 8(a)(1). *A fortiori* a rule which is discriminatory on its face also violates Section 8(a)(1). Thus an employer may prohibit employees from engaging in activities not associated or connected with their work during working time; however, such a prohibition may not single out union activities. [Citations omitted.]

See also *Our Way, Inc.*, 268 NLRB 394 (1983). The credited testimony establishes that Hermany told the banquet department employees that he did not want to see union authorization cards at the facility. This statement is violative of the law for two reasons: Hermany did not limit the restriction to "work time" and he limited the restriction to union authorization cards, and not any other forms of activities or discussions. I therefore find that by telling the employees that he didn't want to see the union authorization cards at the facility, Respondent violated Section 8(a)(1) of the Act.

It is next alleged that Respondent, by Hermany also violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals if they solicited union authorization cards. As I find no evidence to support this allegation, I recommend that it be dismissed. The final allegation regarding Hermany is that at this (or these) meeting, he interrogated the employees about their union activities and the union activities of other employees. The only evidence to support this allegation is McKay's testimony about this meeting. She described the meeting and a statement that she made to Hermany during the meeting. She was then asked if she remembered anything else that he said at the meeting, and she testified, "He asked where the cards came from," although she could not remember anything more specific about this statement. Although I found McKay to be a credible and believable witness, I do not credit her testimony regarding this statement as it is not supported by the testimony of Romano and Brennan, and appears to have been an afterthought in her testimony. I therefore recommend that this allegation be dismissed as well.

It is next alleged that between April 15 and 22 Respondent assigned security officers employed at other of its facilities to engage in surveillance of the employees to discover their union activities. This involves another difficult credibility determination. I found Romano, Vaccaro, and Hoffman (all of whom were still employed at the facility) to be totally credible and believable witnesses with nothing to gain from this proceeding. Although Braga and Colletta appeared to be credible witnesses, as their testimony differs substantially from the employees' testimony, I must make a credibility finding and I credit the testimony of Romano, Vaccaro, and Hoffman who appeared more credible and were disinterested in this proceeding. I do credit the testimony of Braga and

Colletta, however, on one factor and find that they were at the facility only the week of the election, from Monday, April 19 through 22, the day of the election. Braga testified that at their breakfast meeting on April 19, they were told of some specific employees, such as LaRussa who was pointed out to them, who were involved in the union campaign, but they were not told to watch particular employees. Colletta testified that he does not remember being told about LaRussa at that breakfast meeting, and they were not told to watch any particular employees. Based on the credited testimony of Romano, Vaccaro, and Hoffman I discredit this testimony and find it more likely that LaRussa was pointed out to them at this meeting, with instructions to watch him. Why else would they follow LaRussa and Romano on their walk around the facility's grounds and spend a substantial amount of time across from where LaRussa, Vaccaro, and Hoffman were preparing for their luncheon a few days prior to the election? It was certainly not in conformity with the directions they testified they received on April 19 to walk around the facility to be sure that the guests were not disturbed and that signs and fliers were not placed on cars in the parking lot. Although Respondent might argue that they followed LaRussa and Romano through the parking lot and the grounds surrounding the hotel to be sure that they were not leafletting cars, no similar argument could be made for spending 3 hours watching LaRussa and the other employees while standing across from the room where the luncheon was being held.

The law is clear that an employer may observe public union activity, particularly when it occurs on company premises, without violating the Act. The situation is different, however, when company officials do something out of the ordinary. *Metal Industries*, 251 NLRB 1523 (1980); *Southern Maryland Hospital Center*, 293 NLRB 1209, 1217 (1989). As was stated in *Broadway*, 267 NLRB 385, 400 (1983): "The test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act." I find that under all of these tests the conduct of Respondent's security agents violated Section 8(a)(1) of the Act. It was certainly out of the ordinary to follow employees out on a walk during their break time, as well as observing employees for about 3 hours as they set up for and served at a luncheon. Additionally, the evidence establishes that this surveillance was of the kind to intimidate employees in the exercise of their rights to join or not to join the Union. I therefore find that the evidence supports the General Counsel's contention that the security officers were at the facility to engage in surveillance of the employees' union activities on the days preceding the election, and that they did so in violation of Section 8(a)(1) of the Act.

The remaining allegations relate to the five warnings that LaRussa received between March 8 and June 15, and his discharge on June 18. It is alleged that these warnings and the discharge violate Section 8(a)(1), (3), and (4) of the Act because they were caused by his support for the Union and his testimony for the Union at the Board hearing on March 3. The "House Rules" at the facility provide that employees

are subject to termination after receiving three written warnings within a 12-month period. It was allegedly pursuant to that provision that LaRussa was terminated on June 18.

Prior to a discussion of each of the five incidents, it is first necessary to again discuss credibility, which is an important factor herein. Overall, I found the "supporting cast" the most credible. Romano, Vaccaro, Hoffman, McKay, Fuller, and Brennan, the General Counsel's witnesses, were all very credible and believable witnesses, as were Roetto, Audelo, and Chiaravalloti, who testified for Respondent. Each had nothing to gain through this proceeding and appeared to attempt to remember the events of a year earlier as best as they could. The principal characters herein, LaRussa for the General Counsel, and Hugo, Wester, Sorenson, Kalantary, and Dixon for the Respondent, while apparently credible in many respects, were not entirely convincing in all respects. For example, I was initially impressed by the testimony of LaRussa who answered each question directly without attempting to explain his answers on cross-examination. After listening to Respondent's witnesses, however, and most particularly the testimony about the March 17 incident, I came to agree with Respondent's theory and Hugo's testimony that while LaRussa had been an exemplary employee prior to the change in compensation in about January, at that point he developed "a chip on his shoulder" and, as Hugo testified, "it really seemed as though he was taunting us, or tempting us to fire him." Even so, if Respondent would not have given him these warnings, or some of these warnings, if not for his Union activity or testimony at the Board hearing, Respondent will still have violated the Act.

LaRussa received his first warning on March 8 for not appearing for his second shift on March 3, the day that he testified at the Board hearing. Portions of LaRussa's testimony regarding the events of March 2 and 3 are not as credible as the testimony of Kalantary about these events. Kalantary testified that on the evening of March 2, he was told by someone (not LaRussa) that LaRussa would be at the hearing the following day. After checking the schedule and seeing that LaRussa was scheduled to work the 10 a.m. and the 4 p.m. shifts on March 3, he asked LaRussa about the situation. When LaRussa (apparently) admitted that he would be at the hearing, Kalantary said that he would obtain a replacement for his early shift, but asked if he would be there for the late shift and LaRussa said that he would. He did not appear for that shift, nor did he call. LaRussa testified that he was not aware that he would be testifying at the Board hearing on March 3 until 8 p.m. on the prior evening when he called his son from the facility and was told that he had received a subpoena to testify the following day. Shortly thereafter, Kalantary approached him and asked if he would be working the following day. LaRussa said that he had been subpoenaed to testify at the Board hearing and asked Kalantary to get somebody to cover his early shift. When Kalantary asked if he would be there for the evening shift, LaRussa said that he didn't know how long he would be at the Board the following day, "but to play it safe, get somebody to cover for me." He arrived at the Board office at about 9 a.m., began testifying at 1:30 or 2 p.m., testified for an hour or two, but was asked to remain by the Union's attorney and was not "excused" until 5:30 or 6 p.m., at which time he went straight to the facility, arriving at about 7 p.m.

and told Kalantary that he had to be at the Board the following day and therefore would be unavailable for work.

I have problems with certain aspects of LaRussa's testimony regarding this incident: first, and as regards his good faith in this incident, why didn't he tell Kalantary earlier of his unavailability on the following day? LaRussa testified that until 8 that night, he was not aware that he was being subpoenaed to testify the following day. I do not credit this testimony. A Board agent or union attorney would certainly notify a subpoenaed witness prior to the night before his appearance, especially in the situation where LaRussa was the Union's principal supporter throughout the organizing campaign and at the Board hearing. I do not believe that the subpoena was sent out so late that it did not get to LaRussa until the night preceding his appearance and he was not previously told of his appearance. Additionally, without seeing the transcript of the day's hearing, I cannot determine what time LaRussa completed his testimony; however, even crediting his testimony that he completed his testimony between 2:30 and 4 p.m., he never explained why he did not call Kalantary from the Board office to say that he would not be in for his afternoon shift (I do not credit his testimony that on the prior evening he told Kalantary to get someone to cover for him for that shift). Finally, he testified that after being "excused" at 5:30 or 6 p.m., he went straight to the facility to tell Kalantary to get a replacement for him on the following day because he had to be at the Board office that day as well. The obvious question is, why drive about an hour (if his testimony is to be credited) when he could have called Kalantary and told him the same thing? Because of all these questions I have about LaRussa's testimony, I credit the testimony of Kalantary about this incident. As I find that this verbal warning was warranted (especially since Ballanos and Gomez were at the hearing with the union representatives without any consequence) I recommend that this allegation be dismissed.

It is next alleged that the written warning that LaRussa received on March 17, for his confrontation with Sorenson on that day, also violated Section 8(a)(1), (3), and (4) of the Act. I have no difficulty in crediting the testimony of Roetto and Chiaravallati regarding this incident. They appeared to be reluctant witnesses who had nothing to gain from this proceeding. Counsel for the General Counsel, in his brief, alleges that Respondent "provoked" this incident. I disagree and find that LaRussa interfered with the removal of the table and precipitated the confrontation with Sorenson and initiated the shouting and foul language. LaRussa's assignment that day, and on most days, was to set up the buffet table; he had no business interfering with the removal of the table from the room, even if, on the prior day, additional people appeared at the luncheon. In plain language, that was none of his business. To add to his transgression, after Sorenson told him that the customer asked to have the table removed, he cursed at her, without provocation. This inexcusable activity deserved to be written up, as it was. I therefore recommend that this allegation be dismissed.

It is next alleged that his warning for being late on April 4 violated Section 8(a)(1), (3), and (4) of the Act. During the night of April 4 clocks were supposed to be turned ahead for daylight savings time, but LaRussa forgot to turn his clock ahead and was 54-minutes late to work. Unlike the prior two warnings, there is no evidence of bad faith on LaRussa's

part, nor is there any evidence that LaRussa did this purposely as part of a plan to "taunt" the Respondent, as Hugo testified to. In fact, Dixon testified that Respondent normally posts a notice to remind employees of the time change, but he could not recollect doing so on that occasions. Further, because of LaRussa admitted ability at his job, I credit his testimony that he was able to complete his setup in the 1 hour and 6 minutes that he had prior to the arrival of the guests. Counsel for Respondent, in his brief, defends that LaRussa's failure to call in on that morning that he was going to be late was a particularly serious offense. I have found no evidence, however, of bad faith by LaRussa regarding this incident. As he forgot to turn his watch and clocks ahead the night before, in all probability, he was not aware that he was late until he arrived. By then, obviously, it was too late to call. There are two factors herein that convince me that Respondent was now "targeting" LaRussa for warnings: when Fuller was an hour late for the identical reason in 1994 she was not given a warning and was told not to worry about it, and when Kalantary told Dixon that LaRussa was late, Dixon's reaction was: "We need to document it." At that time, Respondent was not aware of the reason for his lateness; he might have had a valid excuse. It appears to me that Respondent was too anxious to give him this warning. The only possible reason for this warning was his known union activity and testimony at the Board hearing 1 month earlier. I therefore find that the April 4 warning violates Section 8(a)(1), (3), and (4) of the Act.

The next warning that he received was dated May 6 and was for an opposite offense-clocking in early on May 5 and 6. It is alleged that this warning violates Section 8(a)(1), (3), and (4) of the Act. The testimony establishes that on May 5 and 6 LaRussa clocked in a half hour early each day. The testimony further establishes that up until about that time, it was a common practice for employees to clock in early and that sometime in about early May (the date is contested) Wester conducted a meeting of employees wherein she told them that they were not to clock in early. LaRussa testified that if there was such a meeting, he did not attend it and was not aware of such a rule on May 6 when he clocked in about a half hour early, as was his practice. On that day, Dixon asked why he clocked in early, and he said that he had a habit of coming in early and clocking in when he arrived. Dixon told him that there was a meeting of employees a few days earlier when the department employees were told not to clock in early, and LaRussa said that he had a doctor's appointment and did not attend the meeting. Dixon told him that he should have known of the rule. Romano testified that Respondent posted a notice at the facility to announce a meeting of the banquet staff on May 5 at 3 p.m.; he told Wester that he could not attend the meeting because he was going to visit his mother in the hospital and she said that it was not a problem, that she would meet with him on the following day to tell him the subject of the meeting. On the following day, his shifts began at 6 a.m. and 3:30 p.m. and he clocked in an hour early for the morning shift and a half hour early for the afternoon shift. Wester asked to see him and told him that he shouldn't take it personally or get upset, but he was clocking in too early, and he should not do it again. That was the first time he was told not to clock in early and he never did it again.

Fuller and Brennan each testified that they had a practice of clocking in early prior to May. Sometime during this period they attended a meeting in which Wester told them not to clock in early and this practice ended. Roetto and Audelo testified that the meeting wherein Wester told them not to clock in early took place "in early May." In a note to the file written by Audelo on July 10, he places this meeting on May 5.

The rate of compensation changed in about January and the employees began punching a time clock at about that time. Wester testified that sometime prior to May 1, Respondent realized that its labor costs were high because employees were clocking in prior to their starting times and (presumably) being paid for this extra time, a procedure she referred to as "milking the clock." She testified that she conducted a meeting of employees on May 4 when she told the employees that they were not to clock in early, although her affidavit given to the Board places this meeting "in or about early May 1993, I'm unsure of the specific date." She testified that LaRussa was not present at the meeting, but she saw him later that afternoon and told him that employees were not to clock in early, and those who did not follow the rule would be documented. Her affidavit referred to above states that she spoke to LaRussa about this subject "a couple of days after the May meeting," i.e., "in or about early May 1993, I'm unsure of the specific date." She did not work on May 5, but on May 6, she saw LaRussa clocking in a half hour early. She checked the time records and saw that he clocked in a half hour early both on that day and the prior day, and that is why he was given the warning. Kalantary testified that on May 4 Wester had a meeting of the banquet department employees wherein she told them not to clock in early. Later that same day, he overheard Wester tell LaRussa that she saw him clock in at 3:30 p.m., when he was supposed to begin work at 4 p.m., and that he was not supposed to do that. He wrote a memo to the file dated May 6, identifying May 4 as the date that Wester told this to LaRussa.

The initial credibility issue is when Wester met with the employees to tell them not to clock in early; in this regard, I credit the testimony of Romano. As stated above, I found him to be an extremely credible and believable witness with nothing to gain from this proceeding. In addition, unlike Wester and Kalantary, he had a good point of reference for the date of the meeting; his Mother was in the hospital and he did not work that afternoon so that he could visit her. The schedule for that week shows that his afternoon shift on May 5 was canceled, presumably so that he could visit his Mother. I therefore find that Wester met with the employees on May 5 or 6, as Wester testified that she did not work on May 5, and told them that they were not to clock in early. This finding is supported by the punch detail report and work schedule. It shows that Roetto clocked in 22 minutes early on May 1; 19 minutes early on May 4; 24 minutes early on May 5, and 4; and 7 minutes early on May 6 and 7. Roetto impressed me as an employee who "goes by the book" and follows orders given to her. It appears to me that if Wester had spoken to the employees on May 4, Roetto would not have clocked in 24 minutes early on May 5. The remaining issue on this incident is when LaRussa was told of the new rule. He testified that when Dixon told him on May 6 that he was not to clock in prior to the commencement of his shift, that was the first time he was told of this

rule. Wester testified that her meeting with the employees was on May 4, which I have previously discredited, but that LaRussa was not at that meeting. She saw him when he arrived for the dinner shift that same day, and told him of the rule against clocking in early at that time. Kalantary testified that he overheard this conversation, but he also testified that it occurred on May 4. This is a difficult determination as I found LaRussa, Kalantary, and Wester to be fairly credible witnesses. Because of my finding that Wester met with the employees after May 4, however, and the fact that she testified that she did not work on May 5, I credit LaRussa's testimony and find that he was not told of this rule until after he arrived and clocked in for work on May 6. I therefore find that the warning issued on May 6 was not warranted, and the only other conclusion is that it was caused by his union activities and appearance at the hearing on March 3. I therefore find that this written warning violates Section 8(a)(1), (3), and (4) of the Act.

The final warning, and the one that resulted in his discharge, was for not appearing for his scheduled shift on Sunday, June 13. This situation also requires some credibility determinations. LaRussa testified that on Tuesday, June 8, he started to tell Wester that he needed Sunday off, to attend Brennan's party, but she said that she was busy and that he should tell her the following day. On the following day, he called Wester's office and told Kalantary to remind Wester that he needed the day off. The credible testimony of Fuller, Vaccaro, Brennan, and LaRussa establishes that the established procedure at the facility was that when employees requested a day off prior to Thursday (when the schedule was posted) the request was granted. If the request was made on or after Thursday, the request was granted if the employee obtained someone to cover the shift. The only exception was on extremely busy days when Wester previously informed the employees that the facility had so many affairs that no time off would be granted. No such notification was given for June 13. Supporting LaRussa's testimony that he had made a timely request for the day off pursuant to Respondent's rules was Brennan's testimony that, on Wednesday, June 9, she saw a note from LaRussa on Wester's bulletin board requesting Sunday off. Respondent's defense, and Wester's testimony, is that she was willing to let McKay substitute for LaRussa, but that she never heard from McKay that she was willing to do so and, for that reason, she kept LaRussa on the schedule. I discredit this testimony. LaRussa's testimony regarding this incident is supported by the extremely credible testimony of McKay and Fuller. McKay testified that LaRussa called her on Thursday and asked if she would cover his shift on Sunday, and she agreed. This is credible, because it was earlier on Thursday that Wester told LaRussa that she could not give him Sunday off, and he offered to get a substitute. LaRussa testified that when he told Wester that McKay said that she would substitute for him on Sunday, Wester told him, "She won't work for me, she's not working for you." Wester denies saying this. I discredit this denial because of the credible testimony of Fuller that on Friday, June 11, when she asked Wester if McKay was going to cover for LaRussa, Wester told her that she was not, because since McKay didn't normally work for her on Sundays, she was not going to work for LaRussa. McKay was not allowed to substitute for LaRussa on Sunday, and because he did not appear for work,

he was give the written warning of June 15. The facts lead to the inescapable conclusion that Respondent was looking for a reason to terminate LaRussa. On two occasions prior to the completion of the schedule, and pursuant to the procedure at the facility, LaRussa asked to be off on Sunday. When this request was denied for no valid reason, he got McKay (who has been employed at the facility since 1986) to cover his shift. Wester's stated reason for not allowing this was that McKay didn't work for her on Sundays, so she couldn't work for LaRussa. Whether that was true or not, and McKay testified that she has worked "plenty of Sundays" when requested by Wester, it is a rather transparent reason for not allowing LaRussa the day off. Having spent 5 days at this hearing observing the witnesses, it quickly became clear to me that LaRussa was a strong willed individual. It is also clear to me that Respondent, whose agents certainly knew him better than I, had no doubt that even if LaRussa was denied the day off, he would still not appear for work on Sunday. I find that Respondent's course of conduct in this incident that lead up to the June 15 warning, clearly indicates that they wanted to get rid of him and knew how to do it. As, admittedly, he was an excellent employee prior to the receipt of these warnings beginning in March, I find that the only conceivable reason for this animus was his Union activity and his testimony at the Board hearing. I therefore find that the June 15 warning violates Section 8(a)(1), (3), and (4) of the Act.

Counsel for Respondent, in his brief, alleges that all of the 8(a)(3) and (4) allegations should fall because there is no evidence of animus. This is not entirely so. The 8(a)(1) violations found (the prohibition of soliciting union authorization cards at the facility and the surveillance of the employees during the week of the election) establish some animus on the part of the Respondent. Even if there were an absence of proof of union animus by Respondent, that does not mean that Respondent would be absolved of any violation. In *Electronic Data Systems Corp.*, 305 NLRB 219 (1991), the Board stated, "Even without direct evidence, the Board may infer animus from all the circumstances." In *Whitesville Mill Service Co.*, 307 NLRB 937 (1992), the Board stated, "Rather we infer from the pretextual nature of the reasons for the discharge advanced by Respondent that the Respondent was motivated by union hostility." In *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966), the court stated:

Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he can infer that there is another motive. More than that, he can infer that the motive is one that the employer desired to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

Because of the pretextual nature of the final three warnings, and the resulting discharge of LaRussa, I can, and do, infer that these acts were motivated by union hostility.

The final allegation is that by terminating LaRussa on about June 18, Respondent violated Section 8(a)(1), (3), and (4) of the Act. I have found that the final three written warnings were unsupported and pretextual, and would not have occurred absent LaRussa's union activity and his appearance as a union witness at the Board hearing. What remains then is the verbal warning of March 8 and the written warning of March 17. Respondent's house rules provide that an employee is subject to termination after receiving three written warnings, which LaRussa would not have received absent his protected activity, or for "gross misconduct." LaRussa's actions on March 17, while extremely serious, do not constitute gross misconduct pursuant to these house rules. I find that as regards the final three warnings to LaRussa and the discharge of LaRussa, the General Counsel has sustained his initial burden, but that Respondent has not sustained its burden that it would have taken this action against him even in the absence of his Union or Board activity. *Wright Line*, 251 NLRB 1083 (1980). I therefore find that his termination was caused by the pretextual warnings he received on about April 4, May 6, and June 15, and that the resulting termination therefore violated Section 8(a)(1), (3), and (4) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by promulgating a rule prohibiting the solicitation of union authorization cards at its facility.
4. Respondent violated Section 8(a)(1) of the Act by assigning security officers to engage in surveillance of its employees' union activities between April 19 and 22, 1993.
5. Respondent violated Section 8(a)(1), (3), and (4) of the Act by issuing written warnings to Joseph LaRussa on April 4, May 6, and June 15, 1993.
6. Respondent violated Section 8(a)(1), (3), and (4) of the Act by terminating LaRussa on about June 18, 1993.
7. Respondent did not violate the Act as further alleged in the complaint.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully issued written warnings to LaRussa on April 4, May 6, and June 15, 1993, I shall recommend that Respondent be ordered to remove these warnings from its files and to notify LaRussa that this has been done and that these warnings will not be used as the basis for future action against him. As I have found that Respondent unlawfully discharged LaRussa, I shall recommend that Respondent be ordered to offer him immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other privileges,

and to remove from its files any reference to the discharge. It is also recommended that Respondent be ordered to make LaRussa whole for any loss that he suffered as a result of the discrimination against him, with interest. Backpay shall be computed in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Parsippany Hotel Management Co., as Agent for the Owner, Parsippany Hilton Hotel Joint Ventures, Parsippany, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating a rule prohibiting the solicitation of union authorization cards at its facility.

(b) Engaging in surveillance of its employees' union activities.

(c) Issuing warnings, terminating, or otherwise discriminating against its employees because of their union activities or because of their participation at hearings of the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Offer LaRussa immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any

other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the warnings issued on April 4, May 6, and June 15, 1993, and to LaRussa's termination on June 18, 1993, and notify him in writing that this has been done and that evidence of this unlawful activity will not be used as a basis for future actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Parsippany, New Jersey copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

<sup>6</sup>If no exceptions are filed as provided by Sec. 102.46 of the Boards Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>7</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."